SUPREME COURT, U.S.
FILED

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NO._____

IN THE
SUPREME COURT OF THE
UNITED STATES

DOROTHY I. FINCH,
PETITIONER, PRO SE

v.

CHARLES A. BUECHEL, JR.,ESQUIRE
RICK SAMUEL FERRIS,
JUDGE MAX BAER,

RESPONDENTS

On Petition for a writ of Certiorari in the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

In what appears to an absence of a specific precedential case establishing , specifically, the "protective rights" of a pro se litigant in a civil case, question is **whether there is a statutory or constitutional right, explicit or implicit, to self representation in a civil case.**

II

Attorney/Lawyers and pro se litigants are two separate and distinct "classes" performing procedurally in the courts. Question is **Whether the pro se litigant is a member of a "protected class," subject to invidious discriminatory animus for purposes of Sec(s) 1981, 1983, 1985(2) or (3) and 1986.**

III

Does a state court judge retain absolute judicial immunity when he fails to accept jurisdiction or, in the alternative, abandons jurisdiction, of a case brought before him; joins private parties in a conspiracy to deny the opposing party due process; prevents opposing party fair and unbiased participation by conducting, in concert with the co-conspirators, a discriminatory and mock non-jury trial against a "non lawyer" litigant, whereby plaintiff is denied her statutory and constitutional due process rights.

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the case

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding.

OPINIONS BELOW

The opinion designated as "Not Precedential" and judgment of a panel of the United States Court of Appeals for the Third Circuit appears at Appendix **A** to the Petition. The opinion of the United States District Court for the Western District of Pennsylvania appears at Appendix **D, E and F** to the Petition.

JURISDICTION

The date on which the United States Court of Appeals for the Third Circuit decided this case was July 27, 2006. A timely petition for rehearing was denied by the United States Court of Appeals on October 17, 2006, and appears at Appendix **B.** This Petition for Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First and Fourteenth Amendments of the United States Constitution; Title 42 U.S.C. Sec(s) 1981, 1983, 1985(3) and 1986; Title 28 U.S.C. Sec(s) 1331 and 1343(a).

STATEMENT OF THE CASE

1. Statement of Facts

In 1995, as part of an annual routine physical examination, appellant Finch's primary physician referred her to an obstetrical/gynecological physician group, in which Rick Samuel Ferris was a partner, for the gynecological examination. All the doctors, including appellant's primary physician,were on the staff or otherwise affiliated with St. Francis Medical Center. On assignment to Dr. Ferris, appellant was not made aware that he was a doctor of osteopathy and did not learn of this until after the surgical event. Appellant was then Age 77.

Appellant suffered severe medical problems following un-authorized and undisclosed surgery by Dr. Ferris, of which she immediately notified Dr. Ferris and requested the medical file from the hospital . Dr. Ferris furnished appellant what later turned out to be inaccurate and misleading information and the hospital withheld the medical file for over two and one/half years, releasing it during discovery after appellant filed claims against Dr. Ferris and the hospital. The lack of medical records and, as stated by attorneys contacted, appellant's age were major factors in the inability to obtain legal representation and appellant was thus forced to proceed in the courts as a pro se litigant.

Appellant filed joint and severable claims against Dr. Ferris and St. Francis Hospital for medical malpractice and corporate negligence, respectively,

claiming Dr. Ferris performed unnecessary and undisdisclosed gynecological procedure for which he had not obtained consent, causing permanent bowel, gynecological and neurological injuries.

The hospital, in its preliminary objections, argued that it was the duty of the physician to obtain the patient's consent for surgery. Dr. Ferris argued that appellant required expert medical testimony to prove her claims against him. The medical records obtained on discovery showed wide-spread actions on the part of the hospital and Dr. Ferris to alter, change and falsify data in the records, and the medical file on its face showed deliberate fraudulent preparation. The hospital also produced two consent forms bearing the signature of Dr. Ferris and purportedly signed by the appellant.

Records from the Department of Obstetrics and Gynecology and affidavits from the chairman of the department were also obtained on discovery. Further discovery included a Request for Admissions directed to and signed by the Executive Officer of St. Francis Medical Center which denied that Dr. Ferris had privileges for the procedure he performed on appellant Finch.

Dr. Ferris and the hospital filed Motions for Summary Judgment arguing appellant needed medical expert testimony to prove her claims. Appellant argued that the evidence obtained on discovery was sufficient to show there existed issues of material fact for her to proceed with her case. The hospital was dismissed and appellant had a Request for

Reconsideration pending disposition of her claims against Dr. Ferris. Dr. Ferris' Motion for Summary Judgment was denied and appellant's claims against Dr. Ferris for lack of informed consent, or no consent, was scheduled for trial on November 26, 2002.

On November 26, 2002, Dr. Ferris failed to appear for call of the list and his attorney, Charles A. Buechel, Jr., told the calendar control judge that Dr. Ferris was in surgery, whereupon appellant was advised by the calendar control judge that she had the option to have case go before a judge. Believing Dr. Ferris had defaulted as to liability, appellant agreed to a non-jury trial. There was no talk, conversation, agreement or any other type conversation between Attorney Buechel and appellant Finch regarding the change from jury to non-jury trial or any other matter that morning. Nor was he present when the calendar control judge and appellant discussed her option to change from jury to non-jury trial, he, Attorney Buechel, having left the room shortly after announcing Dr. Ferris was not appearing because he was in surgery. It was Attorney Buechel, however, who advised appellant, waiting in the hall, that Judge Baer would preside over the non-jury trial. After a very short meeting in his chambers, Judge Baer announced he would not commence the trial until the following morning, November 27, 2002.

On November 27, 2002, Dr. Ferris appeared with Attorney Buechel and within approximately two and one/ half hours, Judge Baer conducted a proceeding described in his verdict as a "non-jury trial," stated he did not read and had no inclination to read the record beyond the

Complaint and Amended Complaint, although he acknowledged the size of the record (representing five years of litigation); ruled out any opening statement or overview of the case by appellant, Finch; made clear from commencement of the proceeding that he found "non lawyers" exasperating; continued throughout the proceeding to refer to appellant's pro se status in a derogatory manner, goading her to "put your case in" then frustrating and thwarting her attempts to comply or testify or enter documents.

Judge Baer accepted and entered the purported consent forms proffered by Attorney Buechel, ignoring appellant's attempts to warn him they were fraudulent documents and that there existed issues between the hospital and Dr. Ferris regarding his privileges in this case. Dr. Ferris testified that he neither obtained nor witnessed appellant's signature appearing on the consent forms and that the hospital had established and obtained the appellant's signature . Attorney Buechel, by suggestive questioning abetted and encouraged Dr. Ferris to falsely testify regarding appellant's pre-surgery medical condition and events surrounding the surgery in general, which appellant was denied the opportunity to enter evidence to disprove

Attorney Buechel and Judge Baer engaged in dialogue that had the appearance of an understanding between them to establish "a record" where Attorney Buechel states " I don't want to be in a situation where we haven't followed procedurally through here." At the close of the proceeding Judge Baer issued his verdict, finding in favor of Dr. Ferris on the basis that appellant was not believable and had not met her burden of proof.

All of the foregoing, in much more detail, as well as the discriminatory attitudes displayed and the incidents and acts engaged in by the defendant/appellees, too numerous to cite in this petition are recorded in the transcript of the court proceedings of November 27, 2002.

Judge Baer did not file his verdict for posting to the docket until fifteen days after the November 27, 2002, proceedings, putting appellant at risk for timely filings with respect to post-trial motions and the 30-day window for appeal to the Pennsylvania Superior Court with regard to claims against the hospital, which had been dismissed via summary judgment, not trial. For this reason, appellant immediately on December 27, 2002. filed Notice of Appeal in the Superior Court of Pennsylvania. On January 13, 2003, Superior Court dismissed the Notice of Appeal stating appellant had failed to file post trial motions. On January 15, 2003, Attorney Buechel filed a Petition to enter judgment on the verdict of November 27, 2002, stating appellant had failed to file post-trial motions.

On January 28, 2003, appellant again filed Notice of Appeal in the Superior Court of Pennsylvania of the judgment on the verdict entered January 15, 2003, by Attorney Buechel. On April 4, 2003, the Superior Court dismissed appellant's second notice of appeal. Thereafter, to retrieve the claims against the hospital, appellant filed various motions and petitions in the Court that dismissed the hospital, Judge Penkower. Judge Penkower, in a meeting in July, 2003, informed appellant he did not have the authority to entertain her petition for review (of the order dismissing the hospital) and the attorney present representing the hospital stated appellant had no further claims against the hospital because her appeals to Superior Court filed in connection with the proceedings on November 27, 2002 did not include the hospital.

The last Order entered by Judge Penkower denying review was October 17, 2003, and to exhaust all avenues in state courts, appellant,on November 5, 2003, filed Notice of appeal in the Superior Court of Pennsylvania, which was dismissed, per curiam, on December 23, 2003. A Petition filed January 26, 2004, for Allowance to Appeal to the Pennsylvania Supreme Court was denied September 16, 2004; application for reconsideration was denied November 5, 2004.

2. Proceedings Below

On December 7, 2004, appellant, Finch, filed this this civil complaint in the United States District Court for the Western District of Pennsylvania seeking damages against appellees, Charles A. Buechel, Jr.,Esquire; Judge Max Baer and Rick Samuel Ferris, D.O., pursuant to Title 42 U.S.C. Sec.(s) 1981, 1983, 1985 (3) and 1986. Appellant alleges appellees violated her statutory and Constitutionally protected rights by conspiracy and discrimination, preventing her from proceeding to trial on her claims of medical malpractice against Dr. Ferris and depriving her of due process.

On December 28, 2004, Dr. Ferris filed an Answer and Affirmative Defense to the Complaint. On January 27, 2005, the District Court granted Attorney Buechel's Motion to dismiss on basis appellant failed to state a claim and granted Judge Baer's Motion to dismiss on grounds that claims against him are barred by the doctrine of absolute judicial immunity.(**App. – D-12a**)

On February 10, 2005, appellant filed a Motion to amend or to vacate the Order of January 27, 2005 and a Motion for Summary Judgment against all the appellees,er producing a complete copy of the transcript of the court proceedings of November 27, 2002. And by Order of February 10, 2005, the District Court, considering appellant's Motions motions for reconsideration, affirmed its order dismissing Judge Baer and Attorney Buechel and denying appellant's motion for summary judgment against them . It ruled that summary judgment against Dr. Ferris premature pending discovery. **(App.–E -16a)**

Discovery in April 2005 included deposition of Dr. Ferris and affidavits by Attorney Buechel and Marcus Williams, nephew of appellant who had accompanied her to court and was witness to all events on November 26 and November 27, 2002. On deposition, Dr. Ferris testified he never told Attorney Buechel that he would not be able to appear for trial, November 26, 20002; that he was at all times ready and able to appear and that and Attorney Buechel agreed he would not appear until notified by Attorney Buechel.

Affidavit by Attorney Buechel stated he told Dr Ferris not to appear for call of the list on November 26, 2002 until notified and that "When Ms. Finch and I agreed after the call of the list to proceed non-jury, the case was assigned by the Honorable Eugene Strassburger, the calendar control judge, to the Honorable Max Baer," infering there was an *agreement between him and appellant.* Affidavit by Marcus Williams certified that Attorney Buechel told the calendar control judge that Dr. Ferris was "in surgery" as the reason for his nonappearance.

On May 26, 2005, Dr. Ferris filed a Motion for Summary Judgment claiming there existed no genuine issues of material fact. On June 24, 2005, appellant filed a Response to the motion with her affidavit certifying that there had been no conversation or any other type communication or agreement between Attorney Buechel and appellant regarding a change from jury to a non-jury trial; that this option was offered by the calendar control judge after Attorney Buechel told the judge Dr Ferris was "in surgery." Also included in appellant's Response to the Motion were copies of the transcript of the deposition of Dr. Ferris and the affidavits of Attorney Buechel and Marcus Williams.

On October 26, 2005, the District Court granted Dr. Ferris summary judgment, stating the record revealed no contact between Dr. Ferris and Judge Baer other than his appearance at trial; that there were no facts indicating Dr. Ferris exhibited any discriminating intent toward appellant on the basis of her race but that appellant *"has consistently asserted that her pro se status led to her purported injuries."* The Court stated appellant failed to establish any nexus between Dr. Ferris' conduct and any deprivation of her rights under "'color of state law'" pursuant to 1983. **(App.-F-18a)** The Court also stated that "*A class of pro se litigants does not satisfy the narrow definition of those protected by Sec. 1985;" that appellant had failed to establish that she is a member of any class protected by Sec. 1985 (2)or (3)* and that Dr. Ferris is entitled to judgment as a matter of law on this claim as well. **(App.– F -18a)**

On November 14, 2005, appellant filed Notice of Appeal to the United States Court of Appeals for the Third Circuit. Judge Baer filed a Motion to be excused from filing a Brief, which the Court granted. Attorney Buechel filed his Brief, claiming appellant failed to allege facts to state a claim pursuant to Sec(s) 1981, 1983, 1985 or .986. Dr Ferris filed his Brief claiming appellant failed to develop facts sufficient to establish a cause of action against him under Sec(s) 1981, 1983, 1985 or 1986. Both Attorney Buechel and Dr. Ferris argued that appellant had alleged only that she was discriminated against because of her pro se status; had failed to identify herself as a member of a racial minority or that any of her constitutionally protected rights were violated on the basis of race and had not alleged any class-based discrimination against them.

On July 27, 2006, the United State Court of Appeals for the Third Circuit entered it Opinion and Judgment. The Court affirmed the District Court's conclusion and reasoning that **Judge Baer is immune from suit. (App. –A -1a)** The Court also concluded that there was no set of facts from which it could infer state action on the part of the defendants Buechel and Ferris; that it **found no nexus between Judge Baer and the private defendants Buechel and Ferris such that these private defendants may be fairly treated as "state actors." (App.-A -1a).**

The Court stated, in connection with the Sec. 1985 conspiracy claim, it **found nothing in the Complaint or the record from which it could draw an inference of racial or class-based motive for the defendants' actions that would support a claim under 1985 (2) or (3), or anything in the record or in the complaint from which it could infer an understanding among the defendants, Baer Buechel and Ferris to "deprive appellant of her constitutional rights on account of her race."** The Court also ruled that in the absence of a 1985 conspiracy, appellant could not state a claim pursuant to Sec. 1986 **(App.-A)**

On October 17, 2006, the Appeals Court denied Appellant's timely filed petition for Rehearing. **(App. B -7a)**

WHY WRIT SHOULD BE GRANTED

The United States Court of Appeals for the Third Circuit has decided important questions of federal law that have not been but should be settled by this court or has decided important questions in a way that conflicts with relevant decisions of this court.

I

Whether there is a statutory or constitutional "protected right," explicit or implicit, to self-representation in a civil case.

"In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73.92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that "in all the courts of the United States, the parties may plead and manage their own causes, personally or by the assistance of Counsel...." The right is currently codified in 28 U.S.C. 1654. *(Faretta v. California, 422 U.S. 806 (1975)*

"The United States Courts of Appeals have repeatedly held that the right of self-representation is protected by the Bill of Rights....This Court's past recognition of the right of self-representation, the federal-court authority holding **the right to be of constitutional dimension,** (emphasis added) and the state constitutions pointing to the right's fundamental nature form a consensus not easily ingnored. "'[T]he mere fact that a path is a beaten one,'" Mr. Justice Jackson once observed, "'is a persuasive reason for following it.'" *(Faretta v California)*

"Finally, the Faretta majority found that **the right to self-representation at trial was grounded in part in a respect for individual autonomy.** (emphasis added) See 422 U.S. at 834. **This consideration is, of course, also applicable to an appellant seeking to manage his own case."** (emphasis added) *Martinez v. Court Of Appeal of California, Fourth Appellate District, 528 U.S. 152 (2000)*

II

Whether a pro se litigant is a member of a "protected class" for purposes of Sec(s)1981, 1983, 1985(2) or (3) and 1986.

Sec(s) 1981, 1983

> The Fourteenth Amendment provides in part, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Title 42 U.S.C. Sec. 1983 provides that "every person who, under color of any statute , ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

"Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution" (a) the deprivation must be caused by the exercise of some right

or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he had acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.....A private party's actions constitute state action under section 1983 where those actions may be "fairly attributable to the state." *Lugar v. EdmondsonOil, Co., 457 U.S.922, 947, 102, (1982)*

"The Supreme Court has developed three tests for determining the existence of state action in a particular case: (1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test. Under the public function test, a private party is deemed a state actor if he or she exercised powers traditionally reserved exclusively to the state. Under the symbiotic or nexus test, a section 1983 claimant must demonstrate that there is sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself." *(Chapman v. The Higbee Co., U.S. Court of Appeals for the 6th Cir.(2003) quoting Wolosky, 960 F.2d at 1335)*

With respect to the public function test, this court stated that:

"Through 1983, Congress sought to give remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his

position.'" Monore v. Pape, 365 U.S. 167, 172 (1961. Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation custom or usage." 42 U.S.C. 1983." *Hafer v. Melo, 502 U.S. 21 (1991)*

".....our holding that Congress enacted 1983 to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. Scheuer v. Rhodes, ...(1974) (quoting Monroe v. Pape Supra at 171-172). Because of the intent, we have held that, in 1983 actions, the statutory requirement of action "under color of" state law is just as broad as the Fourteenth Amendment's "state action: requirement. Lugar v. Edmondson Oil Co.....(1982)" *(Hafer v Melo....(1991*

"The terms of 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and Laws" of the United States. Second, the plaintiff must show the defendant deprived him of this constitutional right "'under color of any statute, ordinance, regulation, custom or usage of any state or territory." This second element requires that the plaintiff show that the defendant acted "under color of law.'" *Adickes v. Kress & Co., 398 U.S. 144 (1970)*

Appellant Finch's allegations and claims involve the public function and symbiotic tests. The lower courts rely on Judge Baer's entitlement to absolute

judicial immunity and assertions of the lack of any evidence of a nexus between Judge Baer and Attorney Buechel and Dr. Ferris where Buechel and Ferris may be fairly treated as "state actors" or any set of facts from which there could be drawn an inference of state action on the part of these defendants.

By misrepresentations and false statements to the calendar control judge on November 26, 2002, Attorney Buechel and Dr. Ferris sought and engaged State involvement in wrongfully obtaining appellant Finch's decision to change from jury to a non-jury trial; thus commencing the conspiracy to control the course and influence the outcome of the case. State involvement continued when judge Baer joined the conspiracy where he, in concert with Attorney Buechel and Dr. Ferris and, by his words and actions demonstrating bias and overt discriminatory animus against the appellant as a "non-lawyer," conducted a sham non-jury trial and denied appellant her constitutional right to proceed in her claims against Dr. Ferris.

In Dennis v. Sparks, 449 U.S. 24 (1980) the Supreme Court held that:

"The action against the private parties accused of conspiring with the judge is not subject to dismissal. Private persons jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of 1983 actions. And the judge's immunity from damages liability for an official act that was allegedly the product of a corrupt conspiracy.... does not change the character of his action or that of his co-conspirators...judicial immunity does not insulate from damages liability those private persons who corruptly conspire with a judge....."

Sec(s) 1985 (2),(3)

Title 42 U.S.C. 1985 (3) provide that:

"If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or equal privileges and immunities under the laws[and] in any case of conspiracy set forth in this section if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators,"

"Section 1985(3) reaches both conspiracies under color of law and conspiracies effectuated through purely private conduct. "'Section 1985 (3) reaches private conspriacies ..that are aimed at invidiously discriminatory deprivation of the equal enjoyment of rights secured to all.'" *Griffin v. Breckenridge, 403 U.S. 88 (1971)*

"The plaintiff must allege and prove four elements: (1) a conspiracy, (2) for the purpose of depriving either directly or indirectly any persons or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3)an act in furtherance of the conspiracy; (4) whereby a person is either injured

in his person or property or deprived of any right or privilege of a citizen of the United States.....The conspiracy not only must have as its purpose the deprivation of "'equal protection of the laws, or equal privileges and immunities under the laws,'" but must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'"(*Carpenters v. Scott, 463 U.S. 825(1983) quoting Griffin v. Breckenridge, 403 U.S.88 (1971)*

"Our precedents establish that, in order to prove a private conspiracy in violation of the first clause of 1985(3) 1 a [506 U.S.263 268] plaintiff must show, inter alia, (1) that some racial, or perhaps otherwise class based, invidiously discriminatory animus [lay] behind the conspirators'action,'" Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), and (2) that the conspiracy "aimed at interfering with rights" that are "protected against private, as well as official, encroachment." Carpenters v. Scott, ... 833 (1983).....We have not yet had occasion to resolve the "perhaps.'" (*Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)*

This court recognized in Faretta v. California that the right to self-representation to be of "constitutional dimension," and codified in 28 U.S.C. 1654, that "in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of counsel." In Martinez v. Court of Appeal of California, this court affirmed its finding that the Faretta majority found the right to self-representation was grounded, in part, in respect for individual autonomy and that this

was "applicable to an appellant seeking to manage his own case." **This establishes that a pro se litigant has guaranteed protected rights under the Constitution and laws of the United States.**

In Lake v. Arnold, et al, U.S. Court of Appeals for the Third Circuit (1997), quoting Tyus v. Ohio Dept. of Youth Svcs, 606 F Supp., 239, 246 (S.D. Oh.(1985): "The Equal Protection Clause of the Fourteenth Amendment, which like 42 U.S.C. Sec. 1985 (3), attacks the deprivation of "any person"' of the equal protection of the laws, has been invoked to prohibit prejudicially disparate treatment on the basis of sex, alienage, handicap, poverty, corporate status and a wide range of nonracial characteristics."

In Lake v. Arnold it is further stated that, "In both Griffin and Scott (sic) the Supreme Court left open the possibility that section 1985(3) might apply to class-based animus not based upon race. In Bray, the sole Supreme Court case to address what might constitute an "otherwise class-based invidiously discriminatory animus,"' the Court clarified only that a class for purposes of section 1985 (3) must be 'something more than a group of individuals who share a desire to engage in conduct the (Sec) 1985 (3) defendant disfavors.'" 506 U.S. at 269"

Pro se litigant activity in proceeding in court is not "conduct" in the sense that others may disfavor, but the exercising of a constitutional right to which no one should have the ability to disfavor, prevent or deny. The writ should be granted to settle the issue of classification of the pro se litigant pursuant to Sec. 1985 (3)

First, because of all the civil litigants who are now or may in the future be categorized as belonging to a "class" subject to invidiously discriminating animosity pursuant to Sec. 1985(3), the pro se litigant, proceeding in court, faces a high probability of discrimination by some attorneys and judges, as in the current case, and the loss of, not only redress or recovery for the injury for which suit was brought, but loss of the basic constitutional right of due process.

Second, of interest to the general public, clarification of the pro se litigant as belonging to a "class" under Sec.1985 (3), would serve to clarify the legal status of the pro se litigant because there is a prevailing belief that a pro se in a civil case does not have "standing" or is not intellectually capable of understanding legal precepts or is otherwise handicapped for various other reasons where the individual is led o believe his right to seek legal redress is limited to whether he can afford a lawyer, whether he needs or wants a lawyer, or even if can get a lawyer to take his case. Settlement of the question regarding a pro se litigant's protection under Sec. 1985(3) would serve to notify an individual of his right to file suit, to control the direction of his case and to accept the outcome of his decision to proceed as a pro se litigant. It may lessen the likelihood of frivolous claims and arguments.

III

Does a state court judge retain absolute judicial Immunity when he conducts a sham non-jury trial; engages in invidious discrimination against a pro se plaintiff and enters a "Verdict"that does not represent adjudication or resolution of the issues in the case brought before him.

" A judge will not be deprived of immunity because the action he took was in error, was done maliciously or was in excess of his authority; rather he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *(Stump v. Sparkman, 435 U.S. 349 (1978) quoting Bradley v. Fisher, 13 Wall, 335, 351 pp 355-357 (435 U.S. 349, 350).* The factors determining whether an act by a judge is "judicial" relate to the nature of the act itself (whether it is a function normally performed by a judge) and the expectation of the parties (whether they dealt with the judge in his judicial capacity)."*(Stump v. Sparkman.*

"State officers may be personally liable for damages under 1983 based upon actions taken in their official capacities....the phrase "acting in their capacities," is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury. Pp.3-5"..... '[o]n the merits to establish personal liability in a 1983 action , it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.'" Id, at 166. quoting Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). *(Hafer v. Melo, 502 U.S. 21 (1991)*

"'A state-court judge does not have absolute immunity from a damages suit under 1983 for his decision to demote and dismiss a court employee Pp223-230 '"..... 'It is the nature of the function performed – adjudication –rather than the identity of the actor who performed it –a judge – that determines whether absolute immunity attaches to the act. Pp225-229'"(*Forrester v. White, 484 U.S. 219* (1991)

"'.....immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for non-judicial actions . i.e., actions taken in the judge's judicial capacity. Forrester v. White, 484 U.S. at 227 – 229; Stump v. Sparkman, 435 U.S. at 360 [502 U.S. 9, 12). Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Id. at 356-357, Bradley v. Fisher, 13, Wall., at 351.'". *(Mereles v. Waco, 502 U.S. 9 (1991)*

In this current case, Judge Baer's immunity from suit was overcome in both sets of circumstances, absence of all jurisdiction as well as actions not taken in his judicial capacity.

First, Judge Baer did not accept jurisdiction, or in the alternative, abandoned jurisdiction of the case brought before him by the plaintiff/appellant, Finch. He declined to read the record, other than the complaint and amended complaint, knowingly ignoring over five year's filings and evidence comprising the record. He ruled out any opening statement or overview of the case by the plaintiff/appellant. He conducted a sham non-jury proceeding, where he thwarted and/or denied all attempts by plaintiff/appellant to enter testimony or documentary evidence in support of her claims against Dr. Ferris; engaged in discriminatory acts in support of his stated animus against "non-lawyers" and entered a"verdict" having no material factual basis.

Second, Judge Baer's acts and conduct in presiding over the proceeding on November 27, 2002, cannot be considered a "judicial" or a "normal" adjudication of claims in the case brought before him by the plaintiff.

It was, instead, a proceeding, structured exclusively, as designated by Attorney Buechel to Judge Baer, to create and, indeed did create, "a record" – a "Verdict"- finding in favor of Dr. Ferris, not based on any credible factual evidence. *Explanation -The case went to trial on claims by appellant Finch against Dr. Ferris for lack of consent, or no consent, for the procedures he performed on the appellant, causing permanent bodily injuries. Dr. Ferris testified repeatedly and extensively during proceeding on November 27, 2002, that he neither obtained nor witnessed the appellant's signature appearing on the purported consent forms presented by Attorney Buechel. Both Dr. Ferris and Attorney Buechel testified extensively that the hospital- which had been dismissed from the case-had obtained the signature appearing on the forms. Judge Baer ruled out all attempts by appellant to testify or present documentary evidence to refute their testimony or to prove the documents fraudulent or, in fact, to meaningfully participate as a litigant in the case.*

The "nature" of the acts and the "function" of the proceeding conducted by Judge Baer on November 27, 2002,were indicative of "understandings" or a "meeting of the minds" between Judge Baer and Attorney Buechel and Dr.Ferris to deny appellant Finch due process; and the "verdict" entered is not based on any legal adjudication or resolution of the issues in the case brought before Judge Baer, but

is premised on Attorney Buechel's statements to Judge Baer indicating a desire to create "a record." (See Forrester v. White) Further, when Judge Baer abandoned the case before him, he was without jurisdiction with respect to that case. And his actions, judicial in nature, were taken in complete absence of all jurisdiction and Judge Baer is thus not immune from suit. See Mireles v. Waco, 502 U.S. 9 (1991) and Bradley v.Fisher, 13 Wall, at 351).

CONCLUSION

On the basis of the foregoing, appellant respectfully requests this court grant the Petition for Writ of Certiorari.

I declare under penalty of perjury that the foregoing statements of fact, including in all continuing pages, are true and correct.

Respectfully submitted,

Dorothy I. Finch

Dorothy I. Finch, Pro se Petitioner
562 Grove Road
Verona, Pa., 15147-1657
(412) 243-1811

APPENDIX – A -Opinion, Judgment 7/27/06

UNITIED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 05-0534
DOROTHY I, FINCH, Appellant
v.
CHARLES A. BUECHEL, JR, RICK
SAMUEL FERRIS; JUDGE MAX BAER

On Appeal from the United States Distric\
Court for the Western District of Pennsylvania
(D.C. Civ. No 04-cv-01856)
District Judge: Honorable Thomas M, Hardiman

Submitted Under Third Circuit L.A.R. 34.1 (a)
July 26, 2006
Before: MCKEE, FUENTES AND NYGAARD
CIRCUIT JUDGES
(Filed July 27, 2006)

OPINION

PER CURIAM

This appeal arises from the orders of the United States District Court for the Western District of Pennsylvania dismissing AppellantDorothy Finch's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) with respect to defendants Baer, and Buchel and granting summary judgment in defendant Ferris's favor.

In December 2004, Finch filed a civil rights Complaint seeking damages against defendants Ferris, Buechel and Baer, for actions taken in a medical malpractice action broughtby Finch against Ferris in the Allegheny County Court of Common Pleas. Finch claimed that the defendants conducted a sham non-jury trial during which they discriminated against her as a pro se plaintiff, and that they also conspired to violate her civil rights and negligently failed to prevent the violation of her civil rights, all in violation of 42 U.S.C.[sec(s)] 1981, 1983, 1985 and 1986. She also raised a state law claim of intentional infliction of emotional distress.

The District Court dismissed Finch's civil rights claims against Buechel and Baer for failure to state a claim pursuant to Rule 12(b)(6). The District Court held that Finch failed to allege that Buechel, Ferris's private attorney in the medical malpractice action, acted under color of state law and thus failed to state a claim pursuant to [Sec] 1983. The District Court also held that finch failed to state a claim upon which relief could be granted as to the [Sec(s)] 1981, 1985 and 1986 claims because Finch failed to allege that Buechel discriminated against her on account of her race. The District Court determined that defendant Baer was immune from suit under the doctrine of absolute judicial immunity because all of the actions Finch Alleged that he took were performed within the scope of his jurisdiction as the trial judge presiding over the medical malpractice action.

The District Court also concluded that Finch's claims against Baer were barred by the Rooker-Feldman Doctrine. Finch filed a reconsideration motion which the District Court denied.

Ferris filed a motion for summary judgment claiming that Finch failed to allege state action under [sec.] 1983, and failed to state a claim under [Sec(s)] 1981 and 1985 that Ferris discriminated against her, or conspired to discriminate against he, on account of her race. The District Court agreed, ruling that Finch failed to establish any nexus between Dr. Ferris' conduct and any deprivation of her constitutional rights "under color of state law." The District Court also determined that Finch's status as a pro se plaintiff did not make her a member of a class protected under Sec. 1995. And the District Court held that Finch failed failed (sic)state a claim ujnder Sec.1981 because the record was devoid of any indication that she belonged to a racial minority and that Dr. Ferris intentionally discriminated against her on account of her race. The District Court declined to exercise jurisdiction over Finch' state law claim. Finch filed a timely appeal.

We have jurisdiction pursuant to 28 U.S.C. [Sec] 1291. We exercise plenary review over the order granting summary judgment. GFL Advantage Fund, Ltd. V. Colkitt, 272 F. 3d 189, 198-99 (3rd Cir 2001). Summary judgment is

proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Id at

> 1 n, We need not address the District Court's ruling pursuant to the Rooker-Feldman Doctrine because we are affirming on other grounds.

199. We view the evidence in the light most favorable to the nonmovant. Id. When a movant shows the absence of a genuine issue, however, the burden shifts to the nonmovant to present evidence sufficient to permit a jury to find in her favor. Id. Our review of the District Court's dismissal Pursuant to Fed. R. Civ. P. 12(b)(6) is likewise plenary. Gallo v. City of Philadelphia.161 F 3d 317, 221 (3rd Cir. 1998). We accept as true all factual allegations in the complaint and will affirm a dismissal under Rule 12(b)(6) only if it is certain that no relief can be granted under any set of facts which could be proved. Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris Inc., et al., 171 F 3d 912, 919 (3rd Cir. 1999). We will affirm.

First, we agree with the District Court's conclusion and reasoning that Judge Baer is immune from suit. Turning to the [sec] 1983 claims against the remaining defendants, Finch must allege

a deprivation of a constitutionally protected right and that the alleged deprivation was committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42 (1988); Mark v. Borough of Hatboro, 51 F 3d 1137, 1141 (3rd Cir. 1995). Assuming all of Finch's allegations against Buechel to be true, as we must, and viewing the facts with respect to defendant Ferris in the light most favorable to Finch, we conclude that there is no set of facts from which we can infer state action on the part of defendants Buechel and Ferris. Ferris, through his private attorney, defended himself at trial in Finch's medical malpractice action. We find no nexus between Judge Baer and the private defendants Buechel and Ferris such that these private defendants may be fairly treated as "state actors."

Likewise, with respect to the [sec] 1985 conspiracy claim, we find nothing in the complaint or in the record from which we can draw an inference of a racial or otherwise class-based motive for the defendants' alleged actions that would support a claim under [sec] 1985(2) or (3).See Davis v. Township of Hillside, 190 F. 3d 167, 171 (3rd Cir. 1999) ((sec1985(2); Griffin v. Breckenridge, 403 U.S. 88 (1971)(Sec. 1985(3). Nor can we find anything in the record or the Complaint from which we can infer an understanding among defendants Baer, Buechel and Ferris to deprive Finch of her Constitutional rights on account of her race. In the absence of a [sec] 1985 conspiracy, Finch cannot state a claim pursuant to [sec] 1986. See Clark v. Clabaugh, 20 F.3d 1290, 1295 n. 5 (3rd.Cir. 1994)

We have thoroughly reviewed the remaining arguments Finch makes on appeal and find them meritless. Accordingly, we will affirm the judgment of the District Court.

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

NO. 05-5034

DOROTHY I. FINCH,
Appellant

v.

CHARLES A BUECHEL, JR., Esquire
RICK SAMUEL FERRIS; JUDGE MAX BAER

On appeal From the United States
District Court of Western Pennsylvania
(D.C. Civ. No. 04-cv-01856)
District Judge:Honorable Thomas M. Hardiman

Submitted Under Third Circuit L.A.R. 34.1(a)
July 26, 2006
Before:MCKEE, FUENTES, AND NYGAARD
CIRCUIT JUDGES

JUDGMENT

This case came on to be heard on the record from the United States District Court for the western District of Pennsylvania and was sumitted

pursuant to Third Circuit L.A.R. 34.1(a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered October 27, 2005, be and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

DATED: July 27, 2006

****

APPENDIX-B – Rehearing Denied-10/17/06

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 05-5034

DOROTHY I. FINCH, Appellant
v.
CHARLES A. BUECHEL, JR., Esquire
RICK SAMUEL FERRIS and JUDGE MAX BAER

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWEPEN, CHAGARES, and NYGAARD, 'Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT

/s/ Richard I. Nygaard
Circuit Judge

Dated: October 17, 2006
CMD/cc: Dorothy I. Finch
David M. Donaldson, Esq.
Michael A. Murphy, Esq.
Holly M. Whalen, Esq.

'The vote of the Honorable Richard I. Nygaard, Senior United States Circuit Judge, is limited to panel rehearing.

****

APPENDIX-C - Mandate filed 10/25/06

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pa., 191-1700
October 25, 2006

Mr. Robert V. Barth Jr., Clerk
United States District Court for the Western
District. of PA
Room 3100 U.S. Post Off. & Courthouse
700 Grant Street, P.O. Box 1805
Pittsburgh, PA 15230

Enclosed is certified copy of the judgment together with copy of the opinion in the above-entitled case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate

(x) We return herewith the certified Record in the cases(s) Documents 1-23

Kindly acknowledge receipt for same on the enclosed copy of this letter.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,
MARCIA M WALDRON
Clerk
By: /s/ Chiquita Dyer
Case Manager

Enclosure
cc: Dorothy I. Finch
Holly M. Whalen, Esq.
Michael A. Murphy, Esq
David M. Donaldson, Esq..

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 05-5034

DOROTHY I. FINCH
Appellant

v.

CHARLES A BUECHEL, JR.,Esquire
RICK SAMUEL FERRIS; JUDGE MAX BAER

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ.No.04-cv-01856)
District Judge: Honorable Thomas Hardman

Submitted Under Third Circuit L.A.R. 34. 1(a)
July 26, 2006

Before: MCKEE, FUENTES AND NYGAARD
CIRCUIT JUDGES

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered October 27, 2005, be and the same is hereby affirmed. Costs taxed. . against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk
DATED: July 27, 2006

Cost taxed in favor of Party as follows:
Appellee Rick S. Ferris:
Appellee's Brief....$42.70
Total..... $42.70

Certified as a true copy and issued in lieu
of a formal mandate on 10/25/06.

Teste:/s/

Chief Deputy Clerk, U.S. Court of Appeals for the
Third Circuit

****

APPENDIX – D –Memo, Opinion,Order-01/27/05

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DOROTHY I. FINCH, Civil Action-No.04-1856
Plaintiff

v.

CHARLES A BUECHEL, JR, Esquire
RICK SAMUEL FERRIS and JUDGE MAX BAER
Defendants

MEMORANDUM OPINION AND ORDER

Plaintiff Dorothy I. Finch filed this *pro se* civil action on December 7, 2004. Her complaint alleges that Defendants' wrongful use of court and civil procedures and demeaning remarks relative to *pro se* litigants adversely affected her ability to proceed with her medical malpractice action in the Court of Common Pleas of Allegheny County. Defendants Charles A. Buechel Jr. and Mr. Justice Max Baer have moved to dismiss the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, those motions will be granted.

In order to state a claim under section 1983, a plaintiff must establish that the defendant acted under color of state law and denied plaintiff a federally protected constitutional or statutory right. *Angelico v.*

Lehigh Valley Hospital, Inc., 184 F 3d 268,277 3rd Cir. 1999). The complaint lacks these allegations. Attorneys performing their traditional functions are not considered state actors solely on the basis of their position as officers of the court. *Id; Polk County v. Dodson, 454 U.S. 312 (1981).* Accordingly, plaintiff's complaint fails to state a claim upon which relief can be granted against Attorney Buechel under 42 U.S.C. [sec] 1983 and will be dismissed.

The complaint also fails to state a claim under [sec] 1981 against attorney Buechel. Plaintiff has not alleged that she is a racial minority or that her constitutional rights were violated on the basis of race. *See Prior v. NCAA*, 288 F.3d 548, 569 (3d Cir.2002) For the same reasons, Plaintiff's Section 1985 and 1986 claims against attorney Buechel fail to state a claim upon which relief can be granted and will be dismissed. See*Brown v. Phillip Morris, Inc., 250* F.3d 789, 805 (3d Cir. 2001); *Rogin v. Bensalem Twp., 616 F.2d 680 (3*d Cir. 1980).

Plaintiff next purports to sue Justice Max Baer of the Pennsylvania Supreme Court for actions taken in his.judicial capacity while he served as judge of the Court of Common Pleas of Allegheny County. Judges are immune from liability when they possess jurisdiction over the subject matter and they are performing judicial acts. *Stump v. Sparkman,* 435 U.S. 349 (1978).

Immunity applies regardless of whether the actions complained of are alleged to have been in error, performed with malice, or were outside of the judge's authority. Id. It is also clear that this immunity is in no way diminished in proceeding under 42 U.S.C. [sec] 1983. *See Pierson v. Ray,* 386 U.S. 547 (1967). Here, Plaintiff's claims relate solely to actions taken by Justice Baer when he presided at a trial over which he had jurisdiction. Accordingly, the doctrine of absolute judicial immunity applies and Plaintiff's claims against Justice Baer are barred.

Furthermore, it is well-settled that federal courts lack jurisdiction to review state court judgments where the relief sought is in the nature of appellate review. *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Co., 263 U.S. 413 (1923).* See also *Blake v. Papadakos,* 953 F.2d 68, 71 (3dCir 1992). The *Rooker-Feldman* doctrine applies in the section 1983 context regardless of whether the state litigation has reached the state's highest court. *See Port Authority PBA v. Port Authority of New York and New Jersey,* 973 F. 2d 169 (3d Cir.1992). Plaintiff asks this court to review decisions made by Justice Baer in the underlying state court medical malpractice action. Such an inquiry is barred by the *Rooker-Feldman* doctrine and Plaintiff's claims against Justice Baer must be dismissed for this independent reason.

Finally, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining common law claim for intentional infliction of emotional distress and will dismiss this claim without prejudice.

WHEREFORE, upon consideration of Defendants' Motions to Dismiss (Docs. No. 6and 8), and plaintiff's Responses thereto, said Motions are GRANTED. Counts I through IV of Plaintiff's Complaint are DISMISSED WITH PREJUDICE as to Defendants Charles A. Buechel Jr., and Justice Max Baer. Count V of Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE as to these Defendants. It is SO ORDERED, this 27th day of January, 2005.

BY THE COURT
/s/
Thomas M. Hardiman
United States District Judge

cc: counsel of record as listed below

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Suite 1414
Philadelphia, PA 19102

****

APPENDIX – E- Order of 02/10/05

IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DOROTHY I. FINCH, Plaintiff
v. Civil Action No. 04-1856

CHARLES A. BUECHEL,JR. Esquire, RICK SAMUEL FERRIS, and JUDGE MAX BAER
Defendants

ORDER

On February 10, 2005, Plaintiff Dorothy I. Finch filed a Motion to Amend or Vacate the Order of January 27, 2995 and Motion for Summary Judgment Against All Defendants (Doc.No.14). The Court will treat the Motion to Amend or Vacate as a Motion for reconsideration of the Court's January 27, 2005 Order. In reaching its decision on January 27, 2005, the Court considered Plaintiff's responses to Defendants' motions to dismiss. Indeed, the Order was clear that the Court considered Defendants' Motions to Dismiss and "Plaintiff's responses thereto."

The Court hereby affirms its decision that Plaintiff has failed to set forth viable claims against Defendants Beuchel and Baer and dismissal of Counts I through IV with

prejudice and Count V without prejudice as to Defendants Buechel and Baer was proper. Defendants Buchel and Baer having been dismissed from this action, Plaintiff's Motion for Summary Judgment against them is DENIED.

Plaintiff's Motion for Summary Judgment as to Defendant Rick Samuel Ferris (Doc. No 14) is DENIED WITHOUT PRDUDICE AS PREMATURE. Plaintiff may renew her Motion for Summary Judgment against Defendant Ferris at an appropriate time after case mangement conference has been held and discovery has been taken.

It is SO ORDERED, this 10th day of February, 2005

BY THE COURT:
/s/ Thomas M. Hardiman
Thomas M. Hardiman
United States District Judge

cc: counsel of record as listed below

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Suite 1414
Philadelphia, PA 19102.

****

APPENDIX – F –Memo, Opinion, Order 10/26/05

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DOROTHY I. FINCH,
Plaintiff

v.

CHARLES A. BUECHEL,JR.,ESQUIRE
RICK SAMUEL FERRIS, D.O., JUDGE
MAX BAER,
Defendants

Civil Action-No 04-1856
Judge Thomas M. Hardiman

MEMORANDUM OPINION

1. Introduction

Pro se Plaintiff Dorthy (sic) Finch (Finch) brought this action alleging various improprieties in a medical malpractice action she prosecuted in the Court of Common Pleas of Allegheny County, Pennsylvania. Finch has sued her former doctor, Rick Ferris, D.O.(Ferris), his attorney Charles A. Buechel (Buechel), and Judge (now Justice) Max Baer for civil rights violations pursuant to 42 U.S.C. sec(s) 1981, 1982 (sic), 1985 and1986. Finch also asserts a state law claim for intentional infliction of emotional distress. Since Justice Baer and attorney Buechel were dismissed from the case on January 27, 2005, the only pending matter for consideration is Defendant Ferris' motion for summary judgment.

II Facts

The following facts are derived from the Evidence of record and are taken in light most Favorable to Finch, the non-movant. *See Strozyk v. Norfolk Southern Corp., 358 F.3d 268, 277 n 7 (3d Cir. 2004).* Prior to the commencement of the present action, Plaintiff filed a medical malpractice suit against Dr. Ferris in the Court of Common Pleas for Allegheny County, Pennsylvania, captioned Dorothy I. Finch v. Rick Samuel Ferris, D.O and St. Francis Medical Center. No. GD 97-5997 (State Case). Finch, acting, pro se, consented to a bench trial before then Judge Max Baer, which was conducted on November 27, 2002. Judge Baer ruled in favor of Dr. Ferris on all claims and Finch's appeals were denied.

On December 7, 2004, Finch filed suit here alleging various improprieties in the State Case. Specifically, Finch alleges that she was discriminated against and deprived of constitutional rights because of her status as a pro se litigant in violation of 42 U.S.C. Sec(s) 1981 and 1983; that she was the victim of a conspiracy to violate her civil rights in violation of 42 U.S.C. Sec. 1985; and that Dr. Ferris intentionally inflicted emotional distress upon her .

Discovery has been completed in this case and the record reveals that Dr.Ferris had no contact with Judge Baer apart from his appearance at the trial of the

State Case. Moreover, Finch's Complaint does not allege, nor do the facts developed in discovery at all support, that she suffered any constitutional violations because of her race. Rather, Finch has asserted that her constitutional rights were violated because of her status as a *pro se* plaintiff.

III Discussion

Legal submissions of *pro se* litigants "must be held to 'less stringent standards than formal pleadings drafted by lawyers'" *Estelle v. Gamble*, 429 U.S. 97, 106, (1976), *reh'g denied,* 429 U.S. 1066 (1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Accordingly, this Court will construe Finch's submission in the light most favorable to her.

Summary judgment is required on an issue or a claim when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©, see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52(1986); *Saldana v. Kmart Corp.,260* F.3d 228, 231-32 (3d Cir. 2001). An issue is "material" only if the factual dispute "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248.

"Summary judgment procedure is properly regarded not as a disfavorable procedural shortcut, but rather as an integral part of the Federal Rules as a whole,

which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U, S. 317, 327 (1986) (internal quotation marks omitted). The parties have a duty to present evidence, neither statements of counsel in briefs nor speculative or conclusory allegations satisfy this duty. *Ridgewood Bd of Educ. v. N.E.for M.E, 172 F.3d 238, 252 (3d Cir.1999).* After the moving party has filed a properly supported motion, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The non-moving party must make a showing sufficient to establish the existence of each element essential to her case on which she will bear the burden of proof at trial. *Celotex, 477 U.S. at 322-223.*

A. Section 1981 Claim

Finch claims that Dr. Ferris discriminated against her in violation of 42 U.S.C. Sec. 1981. In order to survive summary judgment on this claim Finch must "set forth specific facts showing that a genuine issue of material fact exists...Speculation and conclusory allegations do not satisfy this duty." *Ridgewood,172 F.3d at 252 (*citations omitted.)

To maintain a cause of action under Sec. 1981, Finch must show that she belongs to a racial minority and was intentionally discriminated against in respect to one or more of the protected activities because of her race. *See Pryor v. NCAA,* 288 F.3d 548, 569 (3d Cir. 2002). Here, the record is devoid of any indication that Finch's race played any role in the alleged

violations of her constitutional rights. Indeed, Finch has asserted consistently that her status as a *pro se* litigant led to her purported injuries. Finch has failed to establish any facts indicating that Dr. Ferris exhibited discriminatory intent towards her on the basis of her race. Accordingly, Dr. Ferris is entitled to judgment as a matter of law on Finch's Sec. 1981 claim.

B. Section 1983 Claim

To maintain a cause of action pursuant to 42 U.S.C. Sec. 1983, Finch must show that "some person has deprived [her] of a federal right:" and that " the person who has deprived [her] of that right acted under color of state or territorial law." *Gomez v. Toledo,* 446 U.S. 635, 640 (1980). The plaintiff bears the burden of proving that the defendant is a state actor under Sec. 1983. *Groman v. Township of Manalapan,* 47 F. 3d 628,638 (3d Cir. 1995) (citing *West v. Atkins,* 487 U.S. 42, 48 (1988)).

Private parties are not automatically insulated from liability under Sec.1983. When a Sec. 1983 claim is asserted against a private party, however, "the individual alleging such a violation is not relieved of the obligation to establish that the private party acted under color of state law. 'The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action [of the private party] so that the action of the latter may be fairly treated as that of the State itself.'" *Kost v. Kozakiewicz,* 1 F.3d 176, 184 (3d Cir. 1993)(quoting *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974)).

The facts of the record demonstrate the absence of a nexus between Dr. Ferris and any state actor. Dr. Ferris testified that he did not have any contact with Judge Baer prior to the State Case. Therefore, nothing Dr. Ferris did in defending himself occurred "in conjunction with state officials" or is otherwise attributable to the state. Finch's failure to establish any nexus between Dr. Ferris' conduct and any deprivation of her rights "under color of state law" represents a complete failure of proof regarding an essential element of her Sec.1983 claim. See *Kost*, 1 F.3d at 185. Therefore, Dr. Ferris is entitled to judgment as a matter of law on Plaintiff's Sec. 1983 claim.

C. Section 1985 Claim

Though Finch does not specify in her Complaint which subsection of 42 U.S.C. Sec.1985 she invokes, it is clear that only two portions of the statute could potentially apply to her case. Section 1985(1) is inapposite to Finch's claims, as it only pertains to interference with officers of the United States. Likewise, the first clause of Sec. 1985(2) does not apply because it pertains to conspiracies to intimidate witnesses, jurors or parties in a *federal case*. If Finch is to find relief for her alleged injuries under Sec. 1985, she must look to either the second clause of Sec. 1985(2) or Sec. 1985(3).

The second clause of Sec 1985(2) prohibits conspiracies to obstruct "the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws." 42 U.S.C. Sec. 1985(2).

Section 1985(3) prohibits conspiracies entered with the "purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." 42 U.S.C. Sec. 1985(3). The United States Court of Appeals for the Third Circuit has held that the essence of a valid claim under either of these provisions is that the defendant must have acted with class-based invidiously discriminatory animus. *See Brawer v. Horowitz,* 535 F 2d 830, 839-40 (3d Cir.1976) (addressing the second clause of Sec.1985(2)); ***Brown v Phillip Morris, Inc.***,250 F. 3d 789, 805 (3d Cir. 2001)(addressing Sec. 1985 (3)).

Regardless of which of these two subsections of Sec.1985 that she seeks to invoke, Finch cannot prevail on her claim because she only asserts "class-based invidious discrimination" as a *pro se* litigant. The Unites States Supreme Court has held that the classes protected by Sec. 1985 are narrowly drawn, and are limited to victims of racially motivated conspiracies; minorities and their political supporters. *See United Brotherhood of Carpenters & Joiners v. Scott,* 463 U.S. 825, 837-39 (1983)); see also *Silo v. City of Philadelphia,* 593 F. Supp. 870, 873-74 (E.D. Pa, 1984)

A class of *pro se* litigants does not satisfy the narrow definition of those protected by Sec 1985. *See, e.g. Eitel v. Holland, 787 F 2d 995, 1000 (5th Cir. 1986)* (holding that *pro se* litigants are not a class protected by Sec. 1985,), *aff'd on reh'g,* 798 F 2d 815 (5th Cir. 1986), *reh'g denied, 801 F.2d 398 (5th Cir. 1986)(en banc), Silo, 593 F Supp. at 874 (same).* As such, Finch has failed to establish that she is a member of any class protected by Sec.1985(2) or (3) and Dr. Ferris is entitled to judgment as a matter of law on this claim as well.

IV Conclusion The record is devoid of any genuine issue of material fact regarding any of the federal claims that Finch has asserted against Dr. Ferris. Furthermore, the Court, pursuant to 28 U.S.C. Sec. 1367©(3), declines to exercise supplemental jurisdiction over Finch's state law claim for intentional infliction of emotional distress.

An appropriate order follows.

/s/ Thomas M. Hardiman
Thomas M. Hardiman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

DOROTHY I. FINCH, Civil Action No.04-1856
Plaintiff Judge Thomas M Hardiman

v.

CHARLES A. BUECHEL,Jr. ESQUIRE
RICK SAMUEL FERRIS, D.O.
JUDGE MAX BAER
Defendants

ORDER

AND NOW, this 26th day of October 2005, upon Consideration of Defendant Richard Samuel Ferris, D.O's Motion for Summary Judgment (Doc. No 20), it is hereby ORDERED and said motion is GRANTED. Judgment is entered in favor of the Defendant and against Plaintiff on Count I,II,and III. Claim V is dismissed without prejudice to Plaintiff's right to pursue that claim in state Court.
The Clerk of Courts is directed to mark this case CLOSED

BY THE COURT
/s/ Thomas M. Hardiman
Thomas M. Hardiman
United States District Judge

cc: all counsel of record

CERTICATE OF SERVICE

I hereby certify under penalty of perjury that three (3) corrected true and correct copies of the herein Petition for Writ of Certiorari filed in the United States Supreme Court were served on each party of record via U.S. certified mail, return receipt requested, on Feb. 23 2007 as follows:

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